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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA
2010 JUN -7 AM 10:56✓
JEANNE HICKS, CLERK
Matherine Glenn

STATE OF ARIZONA,)	Yavapai Superior
)	Court No.
)	P1300CR20081339
Plaintiff,)	
)	Excerpt of Jury
vs.)	Trial; Oral
)	Argument re
STEVEN CARROLL DEMOCKER,)	Sanction Motion
)	
Defendant.)	
_____)	

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Proceedings held before the Honorable Thomas B. Lindberg

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Prescott, Arizona	May 28, 2010
	11:33 to 12:01 p.m.

Sandra K Markham, CR, RPR, CSR
Certified Reporter
Arizona License No. 50001

ORIGINAL

APPEARANCE OF COUNSEL:

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11:32:38 1 THE COURT: I will deny that request.

11:32:41 2 I had a pending motion in connection with
11:33:25 3 sanctions pointed toward, in particular, some Sorenson Lab
11:33:36 4 testing and I am not sure that we had ever concluded with
11:33:40 5 all -- any other sanction requests, so tell me, if you
11:33:51 6 would, what other sanction motions you feel have not been
11:33:54 7 adequately ruled on.

11:33:56 8 MS. CHAPMAN: Your Honor, I think that is the
11:33:58 9 remaining sanction motion. I think there are some other
11:34:01 10 issues that are still out there that aren't sanctions
11:34:04 11 related, but I think the Sorenson motion is the only
11:34:07 12 pending sanction motion that I am aware of.

11:34:09 13 THE COURT: Why don't you take that one up.

11:34:11 14 MS. CHAPMAN: Sure.

11:34:12 15 Your Honor, there are two issues with
11:34:14 16 respect to the sanctions with Sorenson. The first, and I
11:34:17 17 think when we were before you several weeks ago, you found
11:34:21 18 that the State had committed a disclosure violation with
11:34:24 19 respect to the testing that Sorenson did, and you had
11:34:27 20 taken the matter under advisement --

11:34:29 21 THE COURT: Right.

11:34:29 22 MS. CHAPMAN: -- in terms of what sanction to
11:34:31 23 impose.

11:34:32 24 We filed the motion to further detail the
11:34:35 25 disclosure violations with respect to both the late

11:34:38 1 testing and the false reporting, and then there is also
11:34:41 2 the issue which I think is a separate issue of the
11:34:44 3 destruction of the biological evidence without notice to
11:34:48 4 the Court or to the defense and in violation of your
11:34:51 5 order, and with respect to that, your Honor, we have asked
11:34:53 6 you to preclude that evidence.

11:34:55 7 So I will take it up in that order to speak
11:34:57 8 about.

11:34:59 9 THE COURT: Is there evidence that resulted from
11:35:01 10 that, I guess, first of all?

11:35:03 11 MS. CHAPMAN: From the destruction of the
11:35:04 12 biological evidence?

11:35:06 13 THE COURT: Yes. From the swabs that were taken
11:35:07 14 off the bike.

11:35:09 15 MS. CHAPMAN: Your Honor, my understanding and as
11:35:10 16 indicated in the State's response, after the State both
11:35:14 17 took swabs of the handle bars with the intent to remove
11:35:18 18 all of the DNA from the handle bars of the bike and also
11:35:22 19 took swabs of the parts of the seat with the intent to
11:35:24 20 remove all available biological evidence from those parts
11:35:28 21 of the bike, they then consumed in their entirety without
11:35:31 22 notice to the Court or to the defense the swabs from those
11:35:34 23 areas and what they did was autosomal DNA testing, and my
11:35:40 24 understanding is that at the time they were looking for
11:35:41 25 any evidence of the victim's DNA or biological evidence.

11:35:44 1 Finding none, apparently now their argument
11:35:48 2 is that because they didn't find any of Mr. Democker's DNA
11:35:50 3 on the handle bars, that they should be able to -- to
11:35:53 4 introduce evidence of that.

11:35:55 5 Your Honor, they did not do YSTR testing on
11:35:59 6 those areas and that's the kind of testing that would be
11:36:04 7 most sensitive and able to determine whether
11:36:07 8 Mr. Democker's biological material was on the bike.

11:36:12 9 Because of their consumption of the swabs
11:36:14 10 and again, your Honor, they did that while the defense
11:36:17 11 expert was present at Sorenson, but outside of her view
11:36:21 12 and we don't have any idea why that is, nor have they
11:36:24 13 provided any reason why they then later approved the
11:36:28 14 consumption of those swabs in their entirety without
11:36:31 15 notice to the Court or to the defense and outside the
11:36:34 16 observation of the defense witness.

11:36:36 17 So I think what they have said, your Honor,
11:36:39 18 in their response is that they would like to be able to
11:36:43 19 argue that Mr. Democker's DNA should be in the places that
11:36:46 20 they swabbed and consumed without notice. Doing the kind
11:36:49 21 of testing that's not the most sensitive kind of testing
11:36:53 22 to determine if that biological evidence is there and
11:36:56 23 without any opportunity by the defense to either be
11:36:58 24 present for the swabbing or be present for the testing
11:37:01 25 that's consumptive and now we will never be able to do

11:37:04 1 YSTR testing on those swabs because they were consumed,
11:37:08 2 and that's the kind of testing that you would expect to
11:37:11 3 use and that one would use in the event that you were
11:37:13 4 looking for male DNA.

11:37:15 5 The State did not do that. They didn't
11:37:17 6 consult with anyone before they did not do that, and they
11:37:20 7 have now destroyed those swabs such that that cannot be
11:37:22 8 done by anyone.

11:37:24 9 So with respect to the bike, your Honor, we
11:37:27 10 think that the appropriate sanction is to prohibit the
11:37:29 11 State from mentioning that evidence to the jury at this
11:37:34 12 point, and I don't know if you want to take it up one at a
11:37:37 13 time.

11:37:39 14 THE COURT: No. I don't think so.

11:37:42 15 MR. BUTNER: Mr. Papore.

11:37:43 16 THE COURT: Mr. Papore.

11:37:44 17 MR. PAPORE: Thank you, your Honor.

11:37:45 18 First of all, the bike was swabbed by
11:37:52 19 Kortney Snider, the handle bars and the seat, back in July
11:37:58 20 of 2008. She was looking for the -- she first visually
11:38:06 21 checked the bike out, the handle bars and the seat, and a
11:38:09 22 little bag that hangs under the seat. She did a visual
11:38:12 23 check for blood. Did not see any. So she swabbed the
11:38:15 24 handle bars and the seat and did consumption testing on
11:38:21 25 the extra, I take it, from the swab, back in July of 2008.

11:38:27 1 The bike was brought to Sorenson on February
11:38:33 2 17th of this year, 2010, and while it's true that while
11:38:42 3 Norah Rudin was at the lab, the bike was swabbed. It was
11:38:46 4 not tested however. That swab. The extract taken from
11:38:49 5 that swab. It was later tested in April, and it really
11:39:00 6 confirmed the examination and test by Arizona DPS lab that
11:39:09 7 there was no DNA from Mr. Democker located on that bike.

11:39:13 8 There was a mixture on the handle bars to --
11:39:19 9 and it was DNA obtained that was attributable to an
11:39:22 10 unknown male. This is from Sorenson. Both Mr. Democker
11:39:29 11 and Mr. Knapp were excluded from that major DNA profile.

11:39:35 12 The minor component of the mixture from
11:39:39 13 Sorenson's stated no meaningful comparison to be made of
11:39:43 14 the donor.

11:39:44 15 We have learned from interviewing Ms. Norah
11:39:49 16 Rudin who was present at the lab, but did not observe the
11:39:54 17 serology of the bike, that her interpretation of the
11:40:04 18 analysis -- of the tests that were run on the DNA -- on
11:40:11 19 the swabbing from the bike excluded both Mr. Democker and
11:40:16 20 Mr. Knapp from the -- as donors to this minor DNA
11:40:22 21 component.

11:40:23 22 So really the testing of the bike at
11:40:26 23 Sorenson was just a retesting of what the DPS lab did, and
11:40:31 24 it's not true, your Honor, that the evidence -- it is true
11:40:37 25 that the swab was consumed. It is not true that the bike

11:40:41 1 could not be re-swabbed in other areas, including the seat
11:40:46 2 and other DNA tests could be performed.

11:40:52 3 The bike was tested first in July of 2008.

11:41:00 4 At no time am I aware that the defense has requested an
11:41:03 5 independent test of that bike during all that period of
11:41:07 6 time. It remained in YCSO custody in a cardboard box
11:41:15 7 properly sealed and kept away from the elements.

11:41:20 8 Again, according to the defense's expert,
11:41:23 9 Norah Rudin, she said that it was very likely that,
11:41:28 10 because DNA is so durable, that DNA would still be present
11:41:32 11 on that bike in other areas.

11:41:35 12 So to say that the evidence is gone is
11:41:39 13 simply not a matter of fact. If further testing were
11:41:45 14 desired of that bike, it could be done, but I suspect that
11:41:50 15 the results are not going to be any different than what
11:41:53 16 Kortney Snider found or what Sorenson laboratory found.

11:41:58 17 THE COURT: So what's the evidence being admitted
11:42:01 18 to prove or suggest -- are you suggesting that you are not
11:42:05 19 going to use the testing that was done in any fashion?

11:42:08 20 MR. BUTNER: No, your Honor. We -- I think that
11:42:12 21 the absence of Mr. Democker's DNA as both concluded by
11:42:18 22 Kortney Snider back in July of 2008 and then confirmed by
11:42:23 23 Sorenson this year is what the State wants to present to
11:42:30 24 the jury.

11:42:30 25 THE COURT: As probative of what?

11:42:34 1 MR. PAPORE: As probative of the possibility that
11:42:37 2 the DNA, any trace evidence was wiped away.

11:42:41 3 THE COURT: That's a leap, isn't it?

11:42:44 4 MR. PAPORE: Not when you have the expert saying
11:42:48 5 if someone's riding a bike for -- in the way we understood
11:42:52 6 to be riding, there should be deposits of DNA on there,
11:42:56 7 and the absence of it could not be explained.

11:42:59 8 THE COURT: Invariably if I touch something, it's
11:43:02 9 going to leave my DNA on it.

10 MR. PAPORE: Yes.

11:43:04 11 THE COURT: Is what you are saying?

11:43:07 12 MR. PAPORE: Well, in actuality.

11:43:13 13 THE COURT: And given that there wasn't notice of
11:43:22 14 the consumption, the destruction of the swabs that were
11:43:24 15 taken, how was that in compliance with the Court's orders?

11:43:29 16 MR. PAPORE: Your Honor, that decision to swab
11:43:35 17 the bike while Ms. Norah Rudin was there, according to the
11:43:40 18 interview of Dan Hellwig, detective and lead in charge of
11:43:47 19 this aspect of the case, made the decision. It was --

11:43:51 20 THE COURT: In violation of the Court's order?
11:43:53 21 Correct?

11:43:54 22 MR. PAPORE: Yes. I would have to say that,
11:43:56 23 because during an interview with -- conducted by
11:44:02 24 Mr. Hammond, he acknowledged that he was aware of the
11:44:06 25 Court's order. He acknowledged that the list of items

11:44:14 1 contained in your order did not include the bike and
11:44:23 2 without any direction from the State, made the decision to
11:44:31 3 do a serology on the bike. That's exactly what happened.

11:44:38 4 THE COURT: The -- and he made the decision
11:44:42 5 independent of the County Attorney's office in terms of
11:44:44 6 what type of testing to then do? He or a member of the
11:44:47 7 staff at Sorenson?

11:44:50 8 MR. PAPORE: Well, he, in his interview, I think
11:44:53 9 it was this week -- I am losing track of time, but I think
11:44:57 10 it was this week.

11:44:58 11 THE COURT: Aren't we all.

11:44:59 12 MR. PAPORE: And he said what he -- when he
11:45:02 13 instructed the criminalist to do the -- or the lab analyst
11:45:08 14 to do the swabbing, he said at that time he never expected
11:45:14 15 to run any tests on the swabbing. He did that because the
11:45:19 16 bike was taking up too much room in his storage locker and
11:45:23 17 since Captain Rhodes was there.

11:45:28 18 THE COURT: He wanted to send it back --

11:45:30 19 MR. PAPORE: That's what he said.

11:45:33 20 THE COURT: -- to the Sheriff's office.

11:45:34 21 Thank you.

11:45:35 22 MS. CHAPMAN: Your Honor, there are several
11:45:36 23 inaccuracies about what the State just presented.

11:45:39 24 First, the State specifically, Mr. Butner,
11:45:44 25 approved the consumption of the swab once it was swabbed.

11:45:47 1 So there are two layers of consumption here.

11:45:50 2 The first was the swabbing of the handle
11:45:52 3 bars and the seat. It's also inaccurate to say Kortney
11:45:56 4 Snider swabbed the seat and looked for DNA. Kortney
11:45:59 5 Snider swabbed the bike and the handle bars and the pedals
11:46:04 6 looking for blood. She found the presence of
11:46:06 7 Mr. Democker's blood on the bike pump that was attached to
11:46:09 8 the bike. She did not swab the seat at all and she didn't
11:46:11 9 look for DNA or biologic material in a way that Sorenson
11:46:15 10 swabbed it. She did what is called a general swab, which
11:46:17 11 is a test for the presence of blood. What Sorenson did
11:46:20 12 was both a wet and a dry swab with the intention to remove
11:46:23 13 any and all biologic evidence from the handle bars and
11:46:26 14 from the seat.

11:46:27 15 So the seat had never been swabbed. The
11:46:30 16 handle bars had been swabbed in a general way to look for
11:46:32 17 blood, but never in a wet and dry swab as it was done at
11:46:36 18 Sorenson to look for the presence of biologic evidence.

11:46:38 19 That may have been done without the
11:46:40 20 permission of the State, although the items were all taken
11:46:45 21 there by Detective Rhodes and left there with directions
11:46:48 22 to Sorenson about what to do and Detective Rhodes was
11:46:51 23 present at the time that swabbing was done.

11:46:55 24 Again Norah Rudin was at the lab, but that
11:46:57 25 testing -- and she was there, your Honor, and the State's

11:47:01 1 pleading of -- was May 18th, which listed the items that
11:47:04 2 would be consumed and tested, acknowledges that swabbing
11:47:07 3 is consumptive because some of those items that were
11:47:10 4 listed were items to be swabbed and they acknowledge that
11:47:13 5 swabbing was consumptive. For example, the cell phone
11:47:15 6 battery.

11:47:17 7 The second level of consumption was
11:47:19 8 specifically approved by Mr. Butner without notice to the
11:47:24 9 Court, without notice to the defense, without any notice
11:47:27 10 whatsoever and with no explanation from the State even
11:47:30 11 here today.

11:47:31 12 That consumption testing completely
11:47:35 13 eliminates the possibility for the defense to do the
11:47:38 14 additional testing on these areas that Mr. Papore suggests
11:47:43 15 might be appropriate, and that testing was done for the
11:47:46 16 wrong kind of tests, if what evidence they were looking
11:47:50 17 for was evidence of Mr. Democker's DNA.

11:47:52 18 So for them to stand up now and say, well,
11:47:55 19 we consumed the items without notice and in violation of
11:47:58 20 the Court's orders, we then performed the wrong kind of
11:48:01 21 testing to look for what we were looking for, and now we
11:48:03 22 want to argue the inference of the absence of what we
11:48:06 23 didn't look for correctly, to the jury, is simply mind
11:48:12 24 boggling.

11:48:12 25 We would ask, your Honor to preclude the

11:48:14 1 mention of that evidence.

11:48:15 2 The other inaccuracy is there is the
11:48:20 3 suggestion by Mr. Papore that if you touch anything, your
11:48:23 4 DNA will be left on it. All of the experts, including the
11:48:27 5 State's experts in this case, have acknowledged that the
11:48:31 6 occurrence of touched DNA is highly uncertain. Dr. Rudin
11:48:36 7 did not say in her interview either that she could exclude
11:48:41 8 Jim Knapp or that she would necessarily expect DNA to be
11:48:45 9 on the handle bars.

11:48:46 10 What she said is there are a large number of
11:48:50 11 variables about what happens with respect to touched DNA
11:48:52 12 and that she disagreed with the confusing language that
11:48:55 13 Sorenson used in some of their lab results.

11:48:57 14 Now, the State wants to take that
11:49:00 15 explanation of the confusing language from Sorenson
11:49:03 16 results and apply it to part of their tests, but not all
11:49:05 17 of them and also apply it incorrectly and inconsistently
11:49:08 18 with what Dr. Rudin said.

11:49:09 19 So, your Honor, with respect to the
11:49:12 20 consumption of the testing -- or excuse me -- consumption
11:49:15 21 of the swabs and the swabbing of themselves, we think both
11:49:18 22 of those were in violation of the Court's order.

11:49:20 23 Sorenson knew of the Court's order.
11:49:22 24 Mr. Butner certainly was aware of the Court's order. The
11:49:25 25 State knew they were consuming evidence items at two

11:49:29 1 phases, and they performed the wrong kind of testing to
11:49:31 2 look for what they now want to suggest they didn't find.

11:49:34 3 Your Honor, the second issue is that we
11:49:37 4 think that because the State waited over 20 months to
11:49:40 5 perform this testing at all, when DPS advised them back in
11:49:44 6 August of 2008 you should do YSTR testing on these items,
11:49:48 7 please give us a call, and the State did nothing for 20
11:49:51 8 months and then when they finally got around to doing the
11:49:53 9 testing two-and-a-half weeks before trial, those test
11:49:56 10 results were inaccurate and it took the defense going to
11:50:01 11 Sorenson to spend several days of interviews of Sorenson
11:50:05 12 employees for them to correct those inaccurate results.

11:50:07 13 And, in addition, to excluding the evidence
11:50:10 14 of the bike, your Honor, we also ask you to impose costs
11:50:13 15 both for the defense expert to travel to Salt Lake and
11:50:17 16 view what apparently was only part of the consumptive
11:50:19 17 testing going on and with respect to the defense counsel
11:50:22 18 having to travel and conduct those interviews and litigate
11:50:25 19 this issue at all at this time, given the State's failure
11:50:30 20 to exercise due diligence with the testing and the
11:50:33 21 incorrect test results that it took a defense interview to
11:50:36 22 reveal on what is arguably one of the most important
11:50:41 23 pieces of exculpatory evidence in this case.

11:50:48 24 THE COURT: You want to have another word,
11:50:50 25 Mr. Papore?

11:50:50 1 MR. PAPORE: No, your Honor.

11:50:51 2 I think I want to address the second part of
11:50:54 3 her argument about the report because I didn't address
11:50:56 4 that.

11:50:58 5 THE COURT: Go ahead.

11:50:59 6 MR. PAPORE: It is true, again, at an interview
11:51:04 7 up in the Sorenson Lab following the -- a lengthy
11:51:09 8 interview of the analyst, Alexis Brown, which was
11:51:16 9 concluded on one day and we were set for a second round of
11:51:19 10 interviews with different people the next day, Ms. Brown
11:51:23 11 came in first thing in the morning and advised myself and
11:51:28 12 Mr. Hammond -- I will use her words. I don't understand
11:51:35 13 what -- but she called it a typo. She made a typo on her
11:51:41 14 words under Item 10B which is the left-hand fingernail
11:51:49 15 clippings of the victim.

11:51:50 16 THE COURT: Right.

11:51:51 17 MR. PAPORE: Her typo is she interposed
11:51:53 18 Mr. DeMocker's name and Mr. Knapp's.

11:51:55 19 THE COURT: Right.

11:51:56 20 MR. PAPORE: And it was brought to our attention
11:51:59 21 by her and I think that to suggest this was -- that the
11:52:05 22 early report was false is incorrect. It was not -- it was
11:52:11 23 not meant to be deceitful or deceptive. It was an error
11:52:19 24 by the analyst, and the person who did the technical
11:52:23 25 review of her information, they caught the error.

11:52:28 1 Reported it immediately and issued an amended report.
11:52:34 2 There was absolutely no report that was done for deceitful
11:52:38 3 or deceptive purposes.

11:52:41 4 The analyst made a mistake. She corrected
11:52:44 5 it. It was not caught by the defense by any means. It
11:52:48 6 was, as I stated, brought to our attention the next day
11:52:54 7 after she was interviewed and went back and I am assuming
11:52:59 8 re -- took a second look at her information, and that is
11:53:05 9 not sufficient reason to preclude the State from using
11:53:10 10 that report.

11:53:12 11 It would go to the weight obviously and it
11:53:15 12 would be some -- and the analyst would be subject to
11:53:19 13 cross-examination on that point, but to preclude the
11:53:24 14 point -- to preclude the report would be an overkill of
11:53:28 15 what had happened. Every -- every intent to get the
11:53:36 16 information accurate was made and in doing so, they made a
11:53:42 17 mistake, but it was corrected.

11:53:43 18 So we ask that the State (sic) deny the
11:53:45 19 defense's requests and motion to preclude the use of the
11:53:50 20 Sorenson report, amended report dated April 27, 2010.

11:53:56 21 MS. CHAPMAN: Your Honor, if I might address,
11:53:58 22 first, let me be very clear. We don't want to preclude
11:54:01 23 the results that completely exculpate our client --

11:54:04 24 THE COURT: I am sure don't.

11:54:05 25 MS. CHAPMAN: -- under the fingernails of the

11:54:07 1 victim. We're asking, your Honor, to preclude that
11:54:10 2 portion of the report for which consumptive testing was
11:54:12 3 done in violation of the Court's order, which is with
11:54:14 4 respect to Item 400, which is the bike.

11:54:16 5 Secondly, what we're asking you to do with
11:54:20 6 respect to the 20 month delay in the testing and with
11:54:22 7 respect to the false testing reports is to impose
11:54:25 8 sanctions against the State in addition to the preclusion
11:54:28 9 of any information about Item 400, and those sanctions
11:54:31 10 would be for the cost of Dr. Rudin to attend, for the cost
11:54:34 11 of counsel to travel to Sorenson and conduct the
11:54:37 12 interviews, and for the cost of this litigation.

11:54:39 13 Now, with respect to what Mr. Papore has
11:54:41 14 said about the report and a typo, it is true Ms. Brown
11:54:44 15 described her error as a typo. Her boss, Dan Hellwig,
11:54:47 16 when interviewed by Mr. Hammond at which Mr. Papore was
11:54:50 17 present clearly said that is not a typo. That's not the
11:54:53 18 kind of thing that a scientist calls a typo. It is not
11:54:56 19 the kind of thing that a regular person calls a typo. It
11:54:58 20 was a reporting error. It was a reporting error caught by
11:55:01 21 the defense because -- and Mr. Papore was there for this,
11:55:04 22 too. In the first day of interview with Alexis Brown, we
11:55:07 23 went through with Alexis Brown allele by allele her
11:55:11 24 purported results that included Mr. Democker in the
11:55:15 25 minor -- excuse me -- couldn't exclude Mr. Democker from

11:55:17 1 the minor and could exclude Mr. Knapp.

11:55:19 2 It was through that allele by allele process
11:55:22 3 of talking to her about what her electropherogram showed,
11:55:25 4 what her summary table reported, and what her conclusions
11:55:29 5 stated, that she realized she had made an error.

11:55:31 6 I think that she acknowledged that in the
11:55:34 7 second day when she acknowledged that she had made the
11:55:36 8 error, although she did call it a typo, but it was
11:55:39 9 specifically through that allele by allele examination
11:55:41 10 done with defense counsel the day before, that Ms. Brown
11:55:45 11 realized that she had made an error on the report.

11:55:47 12 It was not from her own examination. It
11:55:50 13 defies logic that she would suddenly discover that error
11:55:54 14 the day after her interview with defense counsel and not
11:55:59 15 be affected by the interview going through allele by
11:56:01 16 allele.

11:56:01 17 And, your Honor, part of the point here,
11:56:04 18 which can't be lost, is if the State had done what it
11:56:06 19 should have done and engaged in this testing 20 months
11:56:09 20 earlier, the defense would have had more time and more
11:56:12 21 careful ability to evaluate this evidence and the errors
11:56:15 22 that came out.

11:56:16 23 But the State's abdication of that
11:56:19 24 responsibility, the false reporting that the defense then
11:56:21 25 had to travel there to correct, should not be laid at the

11:56:24 1 hands of the defense in terms of cost, and so that is why
11:56:27 2 the separate sanction we are requesting with respect to
11:56:29 3 those violations is costs for the expense of figuring that
11:56:34 4 error out, traveling there to do that, and litigating this
11:56:37 5 issue before you today.

11:56:39 6 THE COURT: With regard to the bike swabs, the
11:56:46 7 Court does find that Sorenson was an agent of the, despite
11:56:52 8 the fact they're an independent lab, was an agent for
11:56:56 9 these purposes of the State and with regard to the results
11:57:06 10 on the swab that was wholly consumed without first
11:57:11 11 obtaining permission to do that or notice to the other
11:57:14 12 side, I am going to preclude the use of the results of
11:57:17 13 that testing.

11:57:23 14 Having found that those actions, as
11:57:26 15 described, to have been a violation of the Court's orders
11:57:31 16 with regard to disclosure of DNA evidence, where the DNA
11:57:37 17 evidentiary items are going to be consumed and as a
11:57:40 18 factual finding, though the seat of the bike may still
11:57:45 19 remain for additional testing, I find that to be
11:57:49 20 insufficient given the nature of my understanding of the
11:57:52 21 DNA testing that was done, that was accomplished and have
11:57:57 22 to be accomplished at this stage of the proceedings.

11:58:00 23 So I find there to have been a discovery
11:58:02 24 violation or violation of the Court's orders and I will
11:58:05 25 preclude the use of that testing in that argument.

11:58:10 1 With regard to the financial sanctions, I
11:58:13 2 think I still have the financial sanctions under
11:58:16 3 consideration as part of the other motion. I'll consider
11:58:21 4 whether or not as part of additional sanctions for these
11:58:25 5 purposes to imposing some sort of costs financially. So
11:58:33 6 that part of the argument is under advisement in
11:58:36 7 conjunction with the other motion for sanctions that I
11:58:39 8 already have under advisement pertaining to financial
11:58:42 9 sanctions as a possible remedy or sanction.

11:58:51 10 I had some additional motions.

11:59:03 11 The State filed a motion in limine to
11:59:06 12 preclude reference to an anonymous email that we have
11:59:14 13 discussed previously.

11:59:22 14 Other defense motions pending that you think
11:59:24 15 need -- it's noon right now. Why don't we plan on taking
11:59:28 16 the State's motion up.

11:59:30 17 Give me an idea of what other motions we
11:59:32 18 need to take up this afternoon apart from some idea of
11:59:38 19 preliminary jury instructions settlement.

11:59:41 20 MR. SEARS: Your Honor, this motion that you just
11:59:44 21 spoke to, to preclude from the State, was filed on May
11:59:48 22 24th. Certainly our time to respond has not -- is not
11:59:53 23 even close to running, and I indicated I did want to file
11:59:55 24 a response. What I told the State was should this matter
11:59:58 25 not get resolved before opening statements, understand

12:00:02 1 we're not comfortable talking about opening statements,
12:00:04 2 your Honor, but that I would --

12:00:09 3 THE COURT: I will let you know that I am and I
12:00:11 4 am thinking Wednesday would be a great day for that.

12:00:14 5 MR. SEARS: I am thinking all those things, but
12:00:15 6 there's much to do. That I would not make any reference
12:00:19 7 to this anonymous email directly or indirect in my opening
12:00:23 8 if this matter hasn't been resolved in time, but I do want
12:00:26 9 to file a written response. It's a very brief motion, but
12:00:29 10 it raises a couple of important issues I think are
12:00:31 11 deserving of something in writing from the defense.

12:00:33 12 THE COURT: When can you have your response in?

12:00:35 13 MR. SEARS: By Tuesday.

12:00:36 14 THE COURT: All right. So ordered.

12:00:38 15 MS. CHAPMAN: Your Honor, we also have -- we'll
12:00:40 16 also have an oral motion on the computer -- remaining
12:00:42 17 computer issues. We don't have a transcript yet, but
12:00:45 18 Mr. Butner and I have talked about the parameters of that
12:00:49 19 and I think we also have the issue, if you are seriously
12:00:52 20 contemplating opening statements on Wednesday, which again
12:00:55 21 we aren't hoping that you are contemplating, we do have
12:00:59 22 some issues with respect to the preliminary jury
12:01:02 23 instructions the State filed today, a pleading in that
12:01:04 24 regard.

12:01:05 25 THE COURT: I recognize that, and I recognize

12:01:07 1 some need to do some work on the preliminaries this
12:01:12 2 afternoon, and did receive, as you indicated, some motions
12:01:22 3 concerning preliminary instructions and such.

12:01:26 4 So let's take that up this afternoon.

12:01:30 5 What other motions do you think you need
12:01:32 6 resolved other than obviously the motion in limine
12:01:37 7 pleadings in reference to that?

12:01:38 8 MR. SEARS: The State still has a 15.6 motion
12:01:42 9 that's not been resolved. We can take that up in fairly
12:01:46 10 short order. I don't know there is much to discuss about
12:01:48 11 that.

12:01:49 12 THE COURT: Okay. Anything else that you folks
12:01:51 13 have on the defense side?

12:01:52 14 MR. SEARS: Not yet.

12:01:54 15 THE COURT: All right. We will stand in recess
12:01:57 16 until 1:30.

12:01:59 17 (Noon recess.)

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